and interest shall have been paid) this agreement shall at the expiration of such notice (and in this respect time shall be of the essence) be annulled and in such an event *without prejudice to any other rights available to him at law or in equity*, the vendor shall be entitled:

(a) to resell or otherwise dispose of the building unit as the vendor shall see fit as if this agreement had not been entered into;
(b) to recover from the instalments (excluding interest) previously paid by the purchaser all interest calculated in accordance with para (1) of this clause owing and unpaid; and
(c) to forfeit and retain for himself a sum equivalent to twenty (20) per cent of the purchase price from the instalments (excluding interest) previously paid by the purchaser.

The words emphasized above are not found in the 1979 Rules. Thus counsel submitted that under the 1979 Rules, it was not intended that the vendor should still have the common law right of seeking specific performance over the property.

I am afraid I do not see how the absence of those words under the 1979 Rules necessarily suggests that the common law right of the vendor to ask for specific performance has been restricted or ousted. The remedy of specific performance is distinct and separate from that of treating and accepting a breach by the purchaser as a repudiation of the contract which gives the vendor a right to claim for damages. In my view, the inclusion of those words in the 1985 Rules merely means that in the event the vendor opts to proceed under cl 5(3) and treats the default as a repudiation, other rights (if any) of the vendor under general law, which are not covered under cl 5(3)(a), (b) and (c) are not prejudiced.

For the aforesaid reasons, I allowed the appeal by the plaintiffs and granted an order for specific performance and a declaration that the plaintiffs were entitled to a lien upon unit no B1-10 for the unpaid balance of the purchase price and that the plaintiffs were at liberty to apply to enforce the lien by sale.

Appeal allowed.

Solicitors: *Drew & Napier; RCH Lim & Co; Tan Lee & Partners.*

Reported by *Terence Tan Bian Chye*

MALAYSIAN REPORTS

Public Prosecutor v Zulkifflee bin Hassan

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 44-21-89
HASHIM YEOP A SANI CJ (MALAYA), AJAIB SINGH AND GUNN CHIT TUAN SCJJ
20 APRIL 1990

Criminal Procedure — Bail — Power of judge of High Court — Criminal Procedure Code (FMS Cap 6), ss 389 & 394

The respondent in this case had been convicted on seven charges of criminal breach of trust and had been sentenced to a total of six and a half years' imprisonment to run concurrently. He applied for a stay of execution of his sentence pending appeal. The sessions court allowed him bail in the sum of $200,000 with two sureties and as a condition to the bail ordered the respondent to surrender both his international and restricted passports to the court with liberty to apply as and when the need arises. Subsequently, the respondent applied for the release of his international passport. The application was dismissed by the sessions court judge and the respondent applied to the High Court for the release of the passport by way of a notice of motion under s 389 of the Criminal Procedure Code. The learned judge of the High Court allowed the application for the release of the international passport. The public prosecutor appealed. It was argued that the learned judge of the High Court in this case only had jurisdiction to consider an appeal under s 394 of the Criminal Procedure Code and not an application under s 389 of the said Code.

Held, dismissing the public prosecutor's appeal:

(1) The High Court had jurisdiction to entertain the application under s 389 of the Criminal Procedure Code regarding the amount of bond executed under Chapter XXXVIII of the Code.

(2) As counsel on both sides in this case had not addressed the court on whether the learned judge had the power to order the release of the respondent's international passport under s 389 of the Criminal Procedure Code, that issue is left to be decided on some other occasion after full and relevant arguments by counsel on both sides.

[Responden di dalam kes ini telah disabitkan atas tujuh tuduhan pecah amanah jenayah dan dihukum penjara enam setengah tahun bersama atas semua tuduhan itu. Ia telah memohon penggantungan pelaksanaan hukuman itu menunggu keputusan rayuannya. Mahkamah sesyen telah membenarkan ia diberi jaminan $200,000 dengan dua penjamin dan sebagai syarat jaminan itu ia diperintah menyerahkan paspot antarabangsa dan pasport terhad kepada mahkamah dengan kemudahan diberinya memohon mendapat pasport itu apabila diperlukan. Kemudian responden telah meminta pasport antarabangsanya diberi balik kepadanya. Permohonan itu telah ditolak oleh hakim mahkamah sesyen dan responden telah membuat permohonan ke Mahkamah Tinggi untuk mendapat balik paspot melalui notis usul di bawah s 389 Kanun Acara Jenayah. Yang arif hakim Mahkamah Tinggi telah membenarkan permohonannya mendapat balik pasport antarabangsanya. Pendakwa Raya telah membuat rayuan. Telah dihujahkan bahawa yang arif hakim Mahkamah Tinggi di dalam kes ini hanya mempunyai bidangkuasa mendengar rayuan di bawah s 394 Kanun Acara Jenayah dan tidak ada bidangkuasa mendengar permohonan di bawah s 389 Kanun itu.

Diputuskan, menolak rayuan itu:

(1) Mahkamah Tinggi mempunyai bidangkuasa mendengar permohonan di bawah s 389 Kanun Acara Jenayah mengenai jumlah bon jaminan yang di beri dibawah Bab XXXVIII Kanun itu.

(2) Oleh kerana peguam bagi kedua pihak tidak memberi hujah mengenai samada hakim Mahkamah Tinggi mempunyai kuasa memulangkan balik pasport antarabangsa responden di bawah s 389 Kanun Acara Jenayah, isu itu ditinggalkan untuk diputuskan di masa lain apabila hujah-hujah yang cukup dan padat diberi oleh peguam-peguam semua pihak.]

Case referred to

1 *Sulaiman bin Kadir* v *PP* [1976] 2 MLJ 37 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 389, 394

Gooi Soon Seng (Deputy Public Prosecutor) for the appellant.
Muhammad Shafee for the respondent.

Cur Adv Vult

Gunn Chit Tuan SCJ (delivering the judgment of the court): The public prosecutor, Malaysia, filed a notice of appeal on 5 September 1989, in which it was stated that the appeal was 'against the decision of the honourable Mr Justice Dato' Shaik Daud bin Haji Ismail given at Kuala Lumpur on 4 September 1989, allowing the release of the above-named respondent's international passport under s 389 of the Criminal Procedure Code' which reads as follows:

> The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case as being sufficient to secure the attendance of the person arrested, but shall not be excessive; and a judge may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail or that the bail required by a police officer or Court be reduced or increased.

In the petition of appeal to this court there were six grounds of appeal, but before us Mr Gooi Soon Seng, deputy public prosecutor, indicated that he was only proceeding on the following one ground of appeal:

> 10.5 The learned judge erred in law and on facts in holding that the High Court has jurisdiction to entertain the respondent's application under s 389 of the Criminal Procedure Code.

Before us the complaint was therefore not against the decision of the learned judge in ordering the release of the respondent's international passport, but rather against the decision of the High Court in holding that it had jurisdiction to entertain the respondent's application under s 389 of the Criminal Procedure Code.

The facts of this case were set out in the said petition of appeal. In it, it was stated that Zulkifflee bin Hassan, the respondent, was charged in Arrest Case Nos 74-49/55-87 on 20 April 1987, before the sessions court at Kuala Lumpur on seven counts of criminal breach of trust under s 409 of the Penal Code. He was convicted on 29 July 1989, and sentenced to a total of six and a half years' imprisonment to run concurrently and had thereupon applied for a stay of execution of his sentence pending appeal against conviction and sentence. After having heard the application of the respondent and the objections raised by the prosecution, the sessions court allowed bail of $200,000 with two sureties and as a condition to the bail ordered the respondent to surrender both his international and restricted passports to the court with liberty to apply as and when the need arises.

On 30 August 1989, the respondent applied by way of a miscellaneous criminal application to the High Court, Malaya, at Kuala Lumpur for the release of his international passport. That application was dismissed by the High Court on the ground that the application should be properly made to the sessions court judge, who had granted the bail and made the order to surrender the said passport with liberty to apply. On the same day pursuant to the High Court decision the respondent applied to the sessions court for the release of his passport by way of a notice of application. After hearing arguments by the respondent and the prosecution, the sessions court judge dismissed the application.

On 4 September 1989, the respondent applied again to the High Court for the release of his passport by way of a notice of motion under s 389 of the Criminal Procedure Code. At the outset of the hearing of that application, the prosecution raised a preliminary objection on two grounds, namely, that the High Court had no jurisdiction to entertain the application under s 389 of the Criminal Procedure Code because the application was in similar terms to the application which was dismissed earlier on by the sessions court and that the application to vary that order of the subordinate court should be made under s 394 of the Criminal Procedure Code which is as follows:

> Appeal
>
> Any person aggrieved by any order or refusal of any inferior Court made under this Chapter may appeal to the High Court, which may confirm, vary or reverse the order of such inferior Court.

The other ground of objection was that s 389 of the Criminal Procedure Code concerns the exercise of the High Court of its original jurisdiction. The High Court judge however ruled that the High Court had jurisdiction to entertain the said application under s 389 of the Criminal Procedure Code and after hearing both parties allowed the application and ordered that the applicant 'surrender his passport to the court within 48 hours of his arrival'.

Before us the learned deputy pointed out that the sessions court in this case had allowed bail to the respondent. He referred to *Sulaiman bin Kadir* v *PP*[1] in which case Harun J (as he then was) had expressed the view that 'if a person should not be kept in custody for a moment

longer than is necessary, then the speedy procedure of s 389 of the Criminal Procedure Code rather than that of an appeal was obviously indicated.' In that case the sessions court had refused bail and the High Court held that as there were exceptional and special reasons the court could exercise its discretion under s 389 and granted bail. The learned deputy contended that that case was not applicable as this case was different because the respondent had already been granted bail and the High Court therefore had no jurisdiction to entertain the respondent's application under s 389 of the Criminal Procedure Code.

Encik Muhammad Shafee, counsel for the respondent, also referred to s 389 of the Criminal Procedure Code and *Sulaiman bin Kadir* v *PP*[1] and pointed out that the learned judge in this case had stated in his grounds of judgment that the sessions court judge without making an order one way or the other had said that she refused to exercise her discretion concerning the application for the release of the respondent's international passport. Counsel pointed out that the issue in this case before this court was whether the High Court had jurisdiction to consider the application under s 389 of the Criminal Procedure Code. He referred to the words 'and a judge may, in any case, whether there be an appeal on conviction or not' appearing in s 389 of the Criminal Procedure Code and contended that the High Court therefore had jurisdiction to consider the application under that section of the Criminal Procedure Code.

In reply the learned deputy stated that he was not contending that the High Court did not have concurrent jurisdiction to consider an application under s 389 of the Criminal Procedure Code where the amount of bond was concerned but repeated his contention that the learned judge in this case only had jurisdiction to consider an appeal under s 394 of the Criminal Procedure Code and not an application under s 389 of the said Code.

For a start we considered that it should be borne in mind that s 389 of the Criminal Procedure Code is concerned with the amount of bond executed by a person released on bail under Chapter XXXVIII of the said Code. That section specifies that when a man who is arrested is not accused of a non-bailable offence, no needless impediment should be placed in the way of his being admitted to bail. The discretionary power of the court to admit to bail is not arbitrary, but is judicial, and is governed by established principles. It is established that the courts have to consider the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed for the offence, and in some instances, the character, means and status of the accused. In dealing with an application for bail it is also relevant that the court should consider what are the penal consequences of the act when proved, and what is the nature of the offence charged, and whether the offence charged is or is not a bailable offence. However, it is obvious from a perusal of s 389 of the Criminal Procedure Code that a judge has jurisdiction to consider an application under the said section and we agreed with Encik Shafee that the words 'in any case' import that the powers of the High Court are unfettered. The High Court has the fullest discretion in the matter when considering the amount of the bond and the words 'whether there be an appeal on conviction or not' appearing in the said section gives the judge very wide powers to admit to bail even where an accused person has been convicted and has not appealed. Therefore, where a man convicted has not preferred an appeal, bail may be granted pending the filing of the appeal. In this case we would not agree with the learned deputy that the applicant should have filed an appeal under s 394 of the Criminal Procedure Code and that because he had applied under s 389 of the said Code, the High Court did not have jurisdiction to entertain it.

We would conclude that the High Court had jurisdiction to entertain the application under s 389 regarding the amount of bond executed under Chapter XXXVIII of the said Code. But we would also point out that as neither Encik Gooi nor Encik Shafee had addressed us on whether the learned judge had the power to order the release of the respondent's international passport under s 389 of the Criminal Procedure Code, that issue is left to be decided on some other occasion after full and relevant arguments by counsel on both sides. The appeal is therefore dismissed.

Appeal dismissed.

Solicitors: *Shafee & Co.*

Reported by *Prof Ahmad Ibrahim*